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Attorneys for Defendant

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

LODGED

MAY 16 2002

CLERK, U. S. DISTRICT COURT
DISTRICT OF HAWAII

MAY 28 2002
at 3 o'clock and 30 min. P.M.
WALTER A.Y.H. CHINN, CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JIM McCONNELL and MARK EDWARDS,)	CIVIL NO. 96-01111 DAE/KSC
)	
Plaintiffs,)	SECOND STIPULATION REGARDING
)	CONSENT DECREE AND ORDER FILED
vs.)	MAY 5, 1997 AND ORDER;
)	ATTACHMENT "1"
CITY AND COUNTY OF HONOLULU,)	
)	
Defendant.)	
)	

SECOND STIPULATION REGARDING CONSENT DECREE
AND ORDER FILED MAY 5, 1997 AND ORDER

WHEREAS, on April 10, 2002, the Court Monitor issued an
Interim Report; and

WHEREAS, on May 6, 2002, the Court Monitor made certain
revisions to the Interim Report, which Interim Report as revised
(hereinafter "Interim Report") is attached hereto and
incorporated herein as Attachment "1"; and

WHEREAS, the parties have agreed to accept the recommendations set forth in the Court Monitor's revised Interim Report; now, therefore,

IT IS HEREBY STIPULATED AND AGREED TO, by and between the parties herein, through their respective counsel, that:

1. The construction tolerances set forth in Exhibit "A" to the Interim Report are hereby adopted for purposes of determining whether existing or new curb ramps and sidewalks are in compliance with applicable design guidelines.

2. For purposes of 28 C.F.R. Section 35.151(b) and (e), the City and County of Honolulu (hereinafter "City") shall be required to modify or replace an existing curb ramp which does not meet new construction design guidelines (after taking into account the adopted construction tolerances) or install a new curb ramp where none existed, when the alteration project directly affects the existing curb ramp or the area of the sidewalk where a new curb ramp would be required under the "you touch it, you fix it" policy set forth in Exhibit "B" to the Interim Report. Resurfacing and rehabilitation of roadways shall not per se trigger the requirements to modify or replace existing curb ramps or install new curb ramps.

3. Consistent with Paragraph 3 of the Interim Report, blending, where feasible, shall be the preferred method for

making an existing curb ramp usable without being fully compliant.

4. For purposes of federally funded highway improvements, the City will design for detectable warnings on curb ramps that are modified, replaced, or newly constructed. For non-federally funded projects, the City will defer detectable warnings until final design guidelines are adopted.

5. Curb ramps that were modified or constructed between January 26, 1992 and December 31, 2001, but which do not meet the applicable design guidelines (after taking into account the adopted construction guidelines), do not have to be remodified or reconstructed unless the curb ramps are not usable by individuals with mobility disabilities.

8. The Court Monitor's recommendations set forth in Paragraphs 5, 7, 9, 10, and 11 of the Interim Report are adopted in toto.

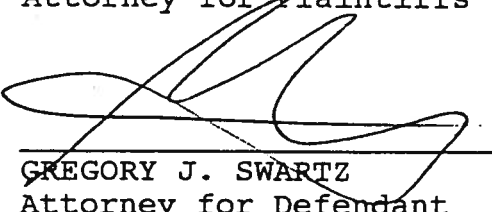
9. Quarterly status reports on the City's Self-Evaluation Plan, as previously required by Section 5(a) of the Consent Decree and Order filed May 5, 1997, shall no longer be required.

10. Except as otherwise provided for herein, all the provisions of the Consent Decree and Order filed May 5, 1997 shall remain in full force and effect.

DATED: Honolulu, Hawaii, MAY 16 2002.



STANLEY E. LEVIN
Attorney for Plaintiffs



GREGORY J. SWARTZ
Attorney for Defendant

APPROVED AND SO ORDER:

DAVID ALAN EZRA

JUDGE OF THE ABOVE-ENTITLED COURT

McConnell, et al. v. City and County of Honolulu; Civil No.
96-01111 DAE/KSC - SECOND STIPULATION REGARDING CONSENT DECREE
AND ORDER FILED MAY 5, 1997 AND ORDER

ATTACHMENT 1

April 10, 2002
(Revised May 6, 2002)

Court Monitor's Interim Report

1. Construction Tolerances

Upon meeting with David Capozzi, the Executive Director of the United States Architectural Transportation Compliance Board, in Portland, Oregon, in informal discussions, David Capozzi has stated that the Board would issue recommendations for construction tolerances taken from the Construction Specifications Institute. I recommend that due to the fact the Board is going to use construction tolerances, we use the tolerances provided in the table below and incorporate them into the stipulation. These tolerances are identical to the conclusions of independent studies performed by Peter Axelson for agencies of the federal government. Engineers, contractors and designers feel that, yes, you usually can provide a perfectly compliant ramp design on paper, but when you get into the actual field, you must allow for some construction tolerances. (EXHIBIT A)

2. Alteration Projects and Definition of What Constitutes an Alteration

In an informal conversation the C&C of Honolulu's consultant, Mr. Bill Hecker, was told by a Representative of the Department of Justice (DOJ), who was also an attendee at the PROWAAC committee meeting in Portland, that the DOJ would not create any regulations and rule making regarding the definition of, or what constitutes an alteration project. In other words, the DOJ is not going to directly address in rule making or provide in any regulations the definition of an alteration project or the magnitude of such projects, which would trigger mandatory curb ramp implementation in relationship to alteration projects.

The court monitor recommends that we enter into the stipulation that mandatory curb ramp removal and replacement be triggered only when a major alteration project which directly affects the curb ramp as in the "you touch it, you fix it" policy, be the mandating driving force of the definition of an alteration project and 28 CFR 35.151. (EXHIBIT B & C)

3. Warping vs. Blending

At the PROWAAC committee meeting, there has been much discussion including case studies to determine the recommendations for blending vs. warping. The definition of blending is a form of "blending" the landing and the ramp slopes to make a ramp be usable without being fully compliant. The blending is generally triggered and dictated by the slope of the roadway grade. Warping is a procedure, which is done in the runoff gutter and also in the landing area. The gutter and/or ramp contain(s) a "cricket" to provide for a more level landing in the ramp area. General policies and thinking are leaning towards accepting the blending procedure, which would be more easily created in the curb ramp due to the existing slope of the roadway surface.

- a. Blending the ramp is a safer procedure for wheelchair users than warping

- b. Warping can cause the wheelchair to "tweak" which can cause one of the four wheels to come out of contact with the surface of the ramp.
- c. Warping also creates problems in the runoff gutter for other issues such as runoff, snow removal, etc.
- d. Warping is more difficult to design and construct and may result in higher costs (EXHIBIT D).

4. Existing and New Ramps Which Meet the New Construction Tolerances (see case studies)

There are approximately 600 to 700 curb ramps, which meet in one form or another, new construction tolerances (EXHIBIT A) – all parties have agreed that ramps, which meet this criteria, can be deleted from being required to be removed and replaced.

NOTE: there is an issue, which has been omitted or neglected to be addressed concerning this subject, which is an element included in the current consent decree.

- a. The current consent decree requires that any curb ramp which is not currently compliant that are affected by an alteration project must be removed and replaced to be fully compliant; however, the plaintiff's party has expressed an opinion which would fall in line with the policy for alteration projects and that is, if those ramps along an alteration project fall within the new construction tolerances (EXHIBIT A), they would not be required to be removed and replaced. Three (3) items must be addressed pertaining to this issue before a decision can be made:

- 1) what the final definition of an alteration project will be;
- 2) if all parties agree that those ramps that meet those percentages do not have to be removed and replaced; and
- 3) what these percentages will be.

NOTE: it is the court monitor's opinion that any ramp, which is not fully compliant, that is affected by an alteration project should be removed and replaced (this is why it is extremely important that the parties address the definition of an alteration project) (EXHIBIT E)

5. **Newly Constructed Ramps**

There are a number of ramps in the C&C Public Rights-of-Way that were constructed by others that were/were not reflected in the Transition Plan. The ramps could have been constructed by:

- a. Private Enterprise
- b. Public Works
- c. State Projects
- d. Other miscellaneous projects which the consultants do not track and record

There are a number of newly constructed curb ramps, which have not been counted and entered into the total count of curb ramps. It is the monitor's recommendation that all curb ramps be counted which serve the public in the C&C's Public Rights-of-Way. Previous discussions have concluded that it is not only ramps that are constructed by the C&C be counted, but all ramps that affect the public good be counted.

NOTE: the court monitor recommends two (2) additional actions:

- 1) that the C&C address these ramps constructed by others and provide a report summarizing which of these ramps are included in the transition plan and ramps not included in the transition plan. All ramps should be counted; and
- 2) that since all curb ramps that affect the C&C must be processed for a building permit, the C&C will track and document all ramps identified in the approved building permits. **(EXHIBIT F)**.

6. **Detectable Warnings**

Detectable warnings will be required, however, the concise figuration and actual implementation has not been determined. Lois Thiboult of the Access Board has expressed concern regarding the impact detectable warnings have on wheelchair users. Lois also stated that she had problems getting technical data and statistics and numbers from wheelchair manufacturers to create a matrix and graph, which would allow the PROWAAC committee to determine average widths of wheelchairs. So in regards to this dilemma, the court monitor pulled volumes of information and made telephone calls as to the average wheelchair widths sold and the highest percentage and numbers of wheelchairs and widths sold. The court monitor then proceeded to forward information to the City's consultant, Bill Hecker, and created a drawing and configuration of curb ramps with detectable warnings and wheelchair runways in which those runways were minus the detectable warnings. The wheelchair runways and widths were based upon the averages and highest percentage of all

wheelchairs sold to help solve the issue. Mr. Hecker then forwarded the concept to members representing the blind community on the PROWAAC committee and will send the documentation to Francine Wai for a preliminary determination of equivalent facilitation.
(EXHIBIT G)

7. Cross Walk Controls

From discussion at the PROWAAC committee the proposed location of the pedestrian crossing signal button has made much progress. In relationship to the C&C, the C&C is exceeding the PROWAAC recommendations at this time for location and numbers. The cross walk controls in the newly constructed resurfacing and maintenance programs on King Street and downtown, Honolulu have two (2) control buttons in each direction. In accordance with ADAAG, a pedestrian signal control button for each direction of crossing be placed within 10" of the approach. The court monitor recommends this configuration until a final design conclusion by the PROWAAC committee due to the fact that it will be more accessible than the PROWAAC committee's direction and heading.

8. Learning Curve

Grandfather clause – the court monitor had drafted some preliminary language for the learning curve grandfather clause, which would allow the City to not remove any curb cuts that were built from the time of ADAAG guidelines to December 31, 2001. These ramps would be exempt as a learning curve process for purposes of good will between all parties and accessibility for the disabled. The learning curve grandfather clause is in the hands of the City's Corporation Counsel at this moment.

9. Lewers Street Project – Outrigger

The entire Lewers Street/Outrigger project is still on-line according to David Carey of Outrigger Hotels and Resorts. There are several curb ramps that are scheduled to be removed and replaced in this area including a "problem child" ramp at the corner of Helumoa Road and Lewers. I've recommended to the City that we extract these specific curb ramps that will be subject and involved in the Lewers Street super block renovation from this year's time frame to the last year of the transition plan. If the Lewers Street project is not complete at the time of the end of the seven (7) year transition plan than the C&C shall remove and replace those curb ramps at that time.

10. Quarterly Report

The quarterly report was late. The plaintiff's parties were not pleased about not having the quarterly report delivered on time. The court monitor will do some investigation to see what the course of action is in developing the quarterly report to see how we can stream-line the quarterly report so that it is entered on time in each quarter.

If there is a continuing problem to produce a quarterly report on time, the plaintiffs have suggested the creation of a sanctioning mechanism with a daily penalty to help urge the defendants to produce a quarterly report on a timely basis. Many factors have created the quarterly report to be late, such as: 1) that the quarterly report that was originally submitted did not include all the activities, ramp designs, and construction that it could have contained.

One thought the court monitor has is that a summary of ramps existing and those constructed by others be provided to the Court Monitor in a separate report.

11. Current Designs

Warping vs blending – there is a significant additional cost to warping the gutter and/or ramp as opposed to blending the ramp. The C&C has entered into gleaning the data base for those ramps, which are warped in the gutter to alleviate it and to reconstitute the designs into blending only. This will create a significant savings to the City as far as construction costs are concerned. It is the court monitors recommendation that the City “glean” out those ramps that involve gutter warping (this includes approximately 40 ramps) and re-design for the blending. (EXHIBIT D)

12. Disabled and Plaintiff's Activity

Bruce Clark expressed his concern on the Tamarind Park ramps that were removed in that he felt it was a waste of money and that Mark Yaboi had complained to Mr. Clark that those ramps were usable and that the ramps at Bishop and Beretania were not. Mark Yaboi asked the question on why the ramps were removed at Tamarind Park when they were usable and the ramps at Beretania were not removed and replaced since they were not usable. The court monitor subsequently expressed to Mr. Clark the fact that the Tamarind Park ramps were not 100% compliant so their removal was automatically triggered by the original consent decree and the current definition of an alteration project.

13. Lunsford Dole Phillips

Lunsford Dole Phillips expressed the same concern on the issue of "tearing up perfectly usable ramps and replacing them when other ramps are not usable". The court monitor again stated to Mr. Phillips that the issue was not of transition plan ramps, but the fact that this was an alteration project on King Street had triggered this activity. Lunsford Dole Phillips has also expressed concern about "detectable warnings". He is inquiring why new ramps have been installed with out the "required" detectable warnings. The court monitor subsequently gave him a complete history of the issue and what the PROWAAC recommendations are concerning detectable warnings and the fact that we are trying to create wheelchair "runways" in the ramps, which have no detectable warnings included inside the "runway". Lunsford Dole Phillips is concerned about blind individuals filing a separate and individual suit for new ramps, which are not constructed with detectable warnings for non-compliance to the new construction guidelines. However, there is a question of law in this matter.

14. General Public

Since becoming the court monitor, the court monitor has been required to provide a continuous program of community awareness and community education on the issue of curb ramps, transition plan, costs, needs, and requirements, etc.

The court monitor is not sure that this type of "social education" is within the scope of his work; however, it is a good educational tool to alleviate "hysteria" and misconceptions within the general and tax paying public.

15. Construction

The contractors, which have been selected, and specifically Royal Contracting, have been providing excellent workmanship and extremely well built curb ramps. Their work quality is acceptable. The monitor is pleased to see the quality of the ramps, which are being produced.

- a. Design – the quality of the construction is a direct result of excellent design by the architects, engineers and the review process of Wilson Okamoto
- b. Comparative quality – the comparative quality of the curb ramps being built in Honolulu exceed those of any other municipality which the court monitor has visited in the Country. There are several reasons for this and some of the reasons are a direct result of the cost of the ramps themselves, such as:

- 1) the process for Barrier identification is thorough;
- 2) the ramps which are involved in the transition plan have topographical survey's performed on each and every ramp;
- 3) each and every ramp is then designed to be compliant to the maximum extent feasible under the new construction guidelines;
- 4) this would account for the significant design cost; however, this process enables the ramps to be designed individually and therefore the result is that the ramps are of excellent design quality and of excellent accessibility levels; and
- 5) furthermore, each one of these ramps is designed to include the removal of the gutter, which provides for a much greater, higher quality, design and construction, of compliant, usable ramps. This methodology of individual designs is creating a greater level of accessibility than any other municipality due to the fact that most of the municipalities provide "cookie cutter" designs that don't take slopes, grades, warpage, etc. into consideration. Most municipalities do not replace the gutter line, which creates a degree of lesser accessibility when the gutter line is removed and replaced. **(EXHIBIT H)**

16. Construction of Ramp Cost

Due to the fact that each one of these designs is individual and the ramps themselves are not the only element being altered (e.g. the gutter line is also being reconstructed) is one of the major reasons why each one of these curb ramps in the alteration projects and transition plan is more expensive than the averages across the Country. It is the court monitor's opinion that this procedure, process and approach is the most prudent and responsible approach that any municipality could take and that the present methodology not be altered.

EXHIBIT A

In response to your request for my recommendation for curb ramp construction tolerances, I propose the following – slope and cross slope tolerances should be measured with a 24” long digital level set on the surface of the ramp or landing in the following way:

i. For ramps, check cross slope every 24” along the ramp run at the top, middle and bottom then check running slope every 24” along the ramp at the top, middle and bottom – this basically provides a 24” grid survey of slope and cross slopes on the ramp;

ii. Since ramp landings have to be level (i.e., 1:48 max) in all directions, check the slope every 24” with the level parallel to each edge of the landing, then place the level at the center of the landing and measure every 24” in both directions of traffic – this basically provides a 24” grid survey of slopes and cross slopes on the landings.

If the finish of the concrete ramp or landing appears to have visible troughs or ridges, be sure to measure the slope by placing the level so it reads the steepest slopes on the surface. To measure whether the surface plane meets tolerance, place the level so it is centered over a trough to measure the maximum gap, or balanced on a ridge with an equal gap at both ends of the level. These gaps and the surface slope measurements must fall within the tolerances listed in the following table:

Surface Slope Requirements	Allowable Slope Tolerance	Allowable Flatness Tolerance
Less than 5%	+0.9% max.	¼” max. gap
5% - 8.3%	+1.2% max.	3/8” max. gap
Greater than 8.3% - 10.0%	+1.5% max.	½” max. gap
Greater than 10.0%	Engineer’s Discretion	½” max. gap

EXHIBIT B

1.2.2 - "You Touch/You Fix"

Rule. Any elements or features within the public right-of-way that affect pedestrian usability and are being altered in such a way to allow them to be made accessible shall, to the maximum extent feasible, meet the new construction requirements.

EXHIBIT C

28 CFR 35.151 New Construction and Alterations

- (a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.
- (b) *Alteration.* Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.
- (c) *Accessibility standards.* Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR Part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (Appendix A to the Department of Justice's final rule implementing title III of the ADA, _____ F.R. _____) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at {4.1.3(5) and {4.1.6(1)(j) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.
- (d) *Alterations: Historic properties.* (1) Alterations to historic properties shall comply, to the maximum extent feasible, with {4.1.7 of UFAS or {4.1.7 of ADAAG. (2) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of {35.150.
- (e) *Curb ramps.* (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway. (2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

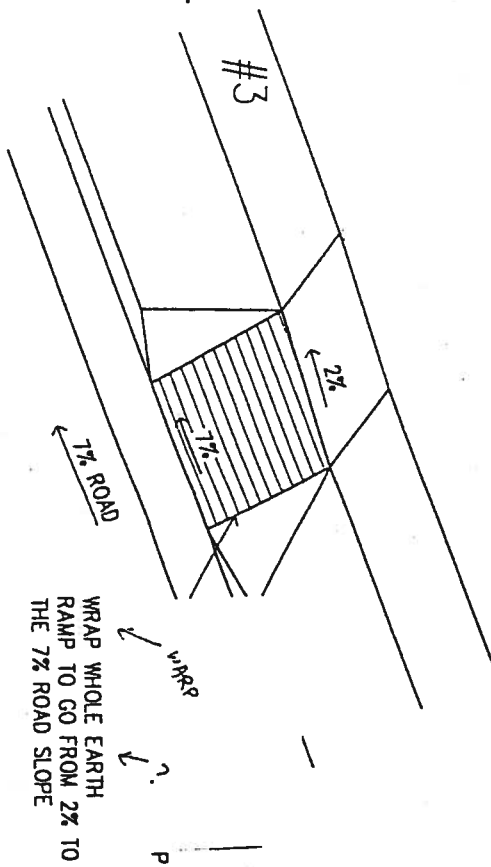
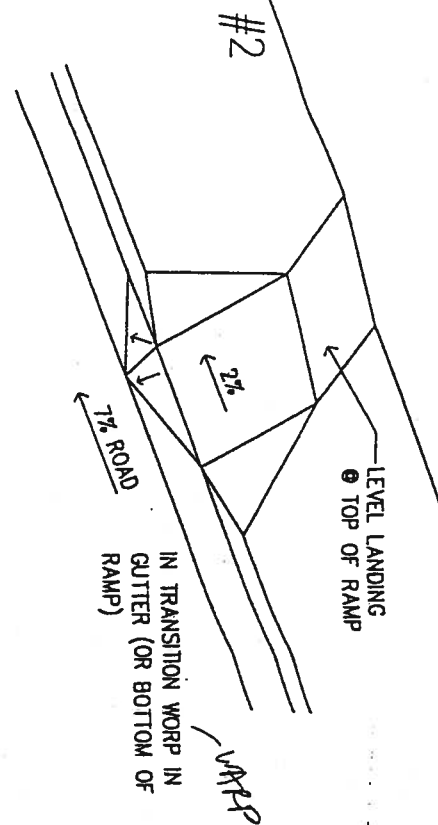
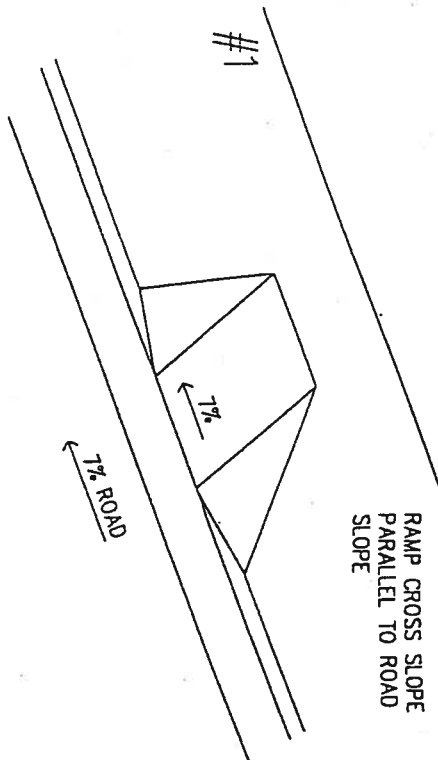
Alteration projects within the public rights of way are defined as improvement projects falling into 3 general categories:

1. Sidewalk improvements (excluding maintenance repairs) – construction of concrete or asphalt concrete sidewalks
2. Roadway widening projects – construction of road improvements which alter the pavement width and provide for concrete and/or asphalt concrete sidewalk improvements
3. Major improvement projects which touch the sidewalk at pedestrian crossing locations (e.g. traffic signal installation/relocation of traffic signals)

Maintenance resurfacing and rehabilitation of streets to extend the useful life of the roadway and do not alter the basic configuration of the existing roadway width are not considered alteration projects.

EXHIBIT D

RAMP CROSS SLOPE
PARALLEL TO ROAD
SLOPE



CURB RAMP WARP OPTIONS

CURB RAMP WARP OPTIONS

PROJECT NAME:

Project Location:

Date: 3/27/99

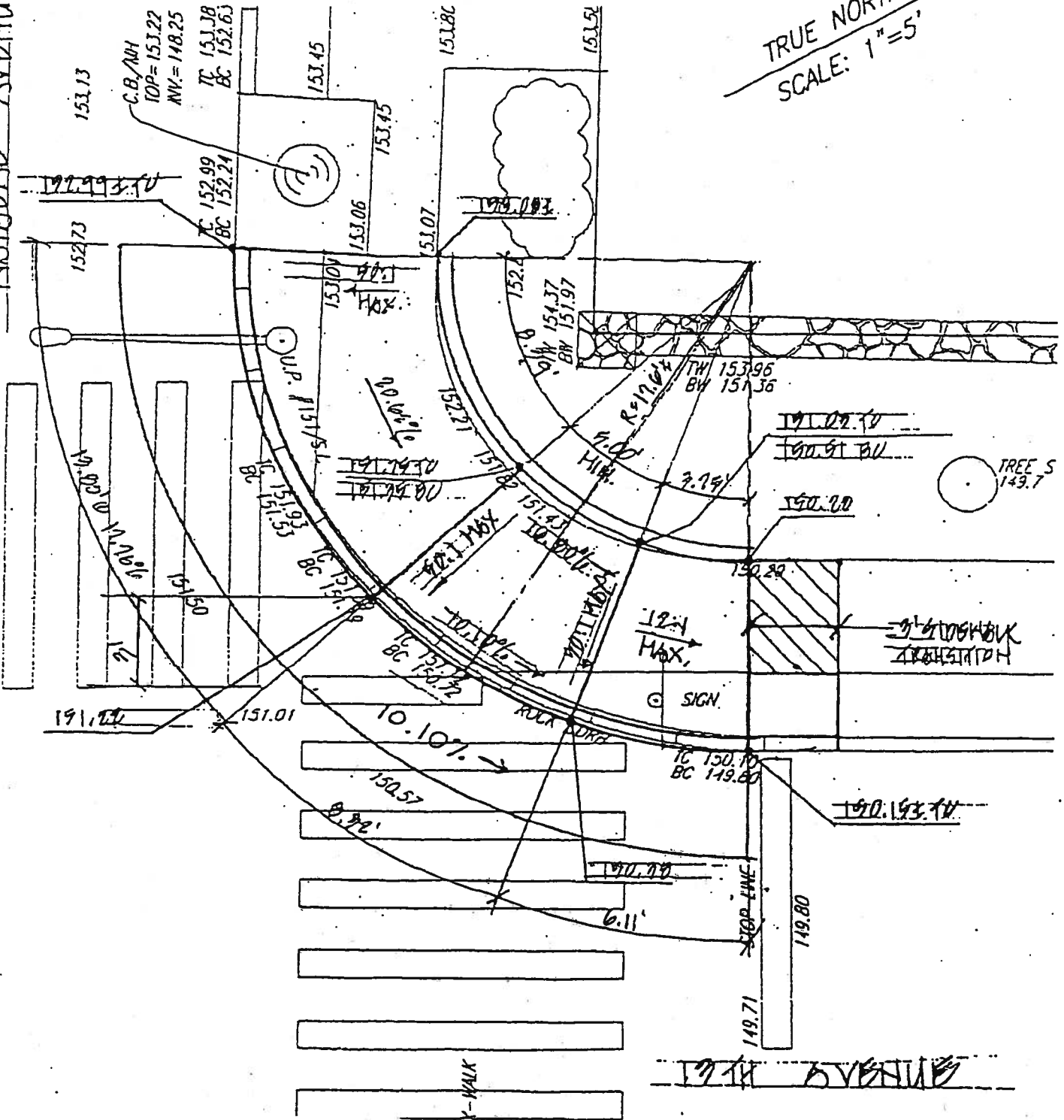
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Scale: NOT TO SCALE

Sheet Number:

1916 AVENUE

TRUE NORTH
SCALE: 1"=5'



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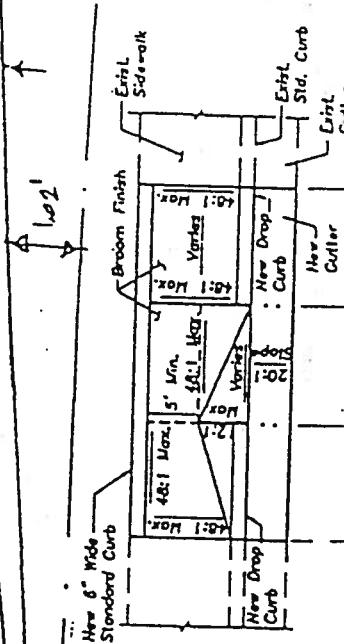
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Expt. 1256

6511101 H1502 200250 H 1 975



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SECTION C CARD RAMP

661101 H5K8Q ZATCAF 11-9/c

2 GRADES 28.5%

RAMP WARP

(Type B: Ramp)

EXHIBIT E

practices and that the consultant's fees and costs will be subject to the provisions of the contract executed between the City and the consultant; provided, however, that nothing contained in this contract shall be inconsistent with this Consent Decree and Order.

(c) The Self-Evaluation and Transition Plan shall be prepared in accordance with the requirements of ADA Title II and the Department of Justice implementing regulations at 28 C.F.R. Sections 35.105 and 35.150(d), including the requirements regarding public input. In accordance with the provisions of ADA Title II and the Department of Justice implementing regulations at 28 C.F.R. Section 35.150(d)(2), the Transition Plan shall state that the City shall first install curb cuts at priority locations as set by federal law. *sloped areas*

(d) It is understood and agreed that the Self-Evaluation shall include an evaluation of all the City's policies and practices with respect to accessible streets and sidewalks, particularly with respect to the installation of curb cuts in connection with the reconstruction and resurfacing of streets to ascertain and/or ensure the compliance of these policies and practices with federal law.

(e) It is understood and agreed that the City intends to extend the Self-Evaluation and Transition Plan effort to address the needs of all individuals with disabilities with respect to accessible streets and sidewalks, including access to bus stops. Nothing contained herein shall be construed as prohibiting the

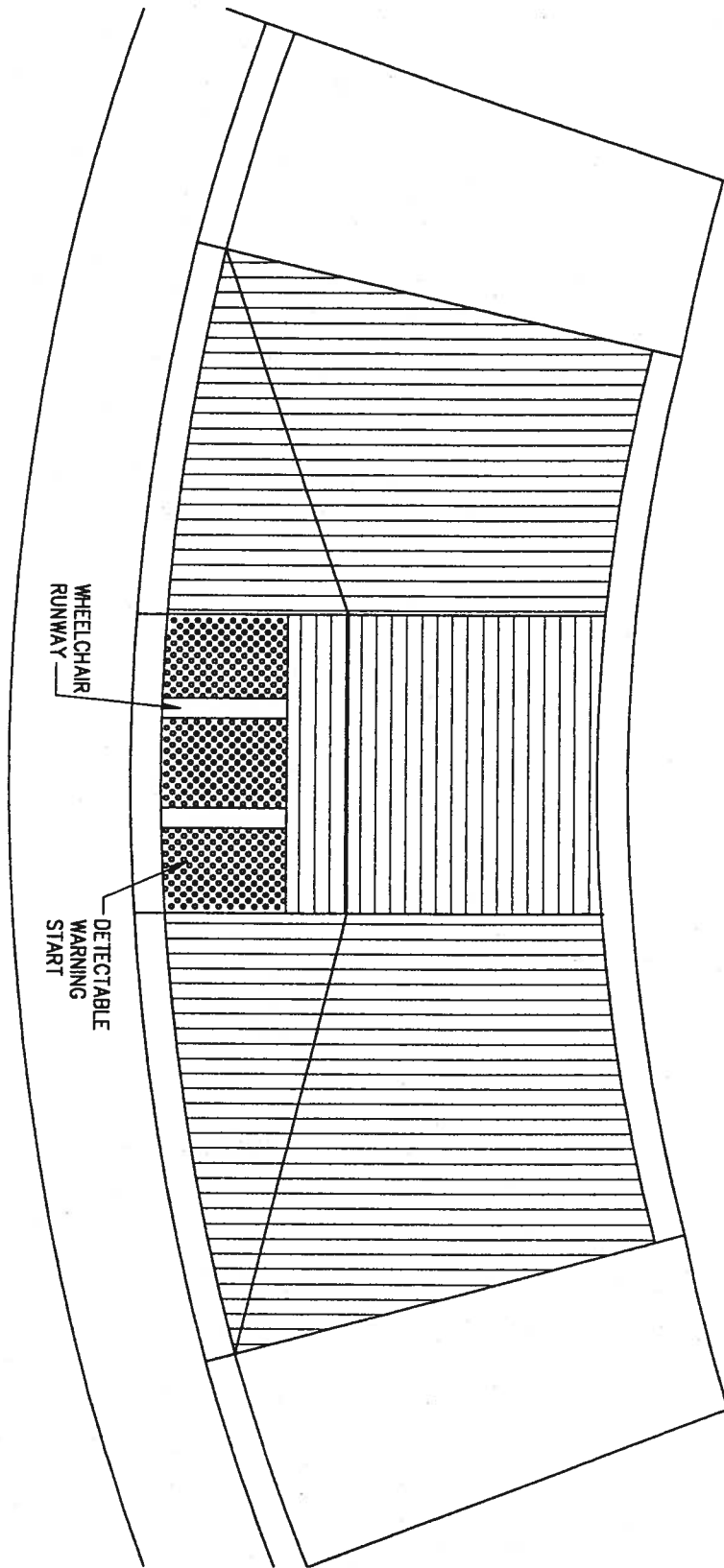
EXHIBIT F

Not included (Exh F)

Maps of Downtown
S. Beretania
Waikiki

New Curb Cuts
Existing Curb Cuts

EXHIBIT G



WHEELCHAIR RUNWAY

PROJECT NAME:

Project Location:

Date: 2.27.02

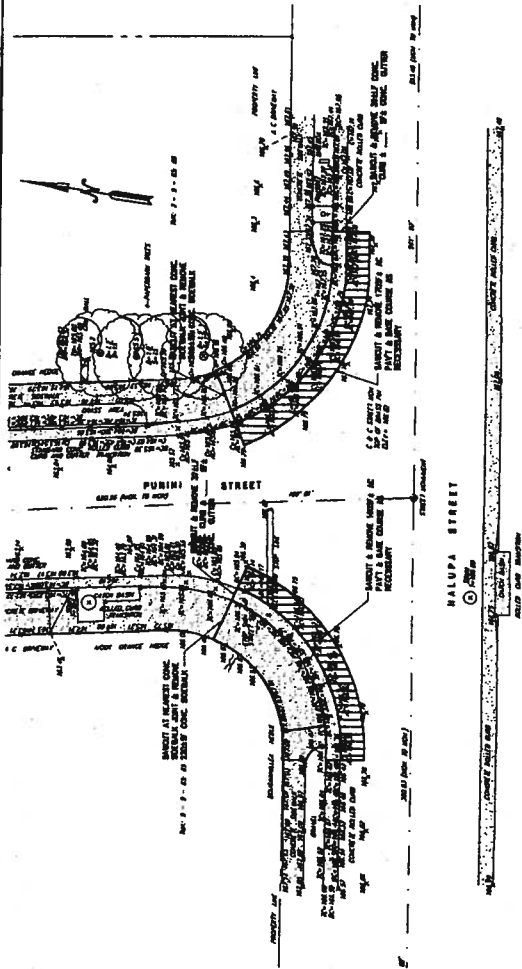
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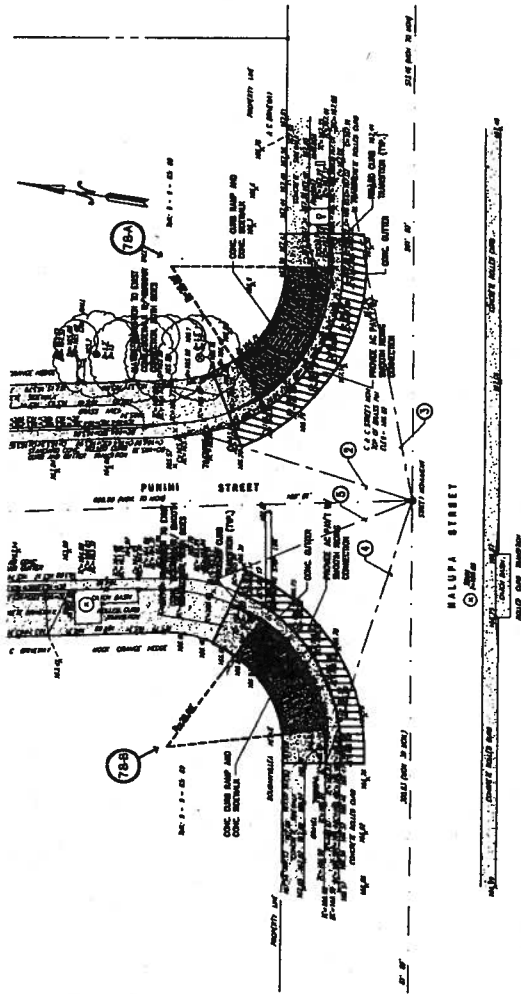
Sheet Number:

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EXHIBIT H



SITE 78 - DEMOLITION PLAN
SCALE 1"=10'



SITE 78 - RAMP PLAN 1
SCALE 1"=10'

CONTROL POINT SURVEY TIES				
NO.	FROM	TO	AZ	DIST
1	CP1	—	—	—
2	CP1	2000PA	180°17'30"	33.80'
3	CP1	2000PA	180°40'20"	34.77'
4	CP1	2000PA	187°29'20"	48.80'
5	CP1	2000PA	187°19'40"	33.80'



DEPARTMENT OF DESIGN AND CONSTRUCTION
CIVIL DESIGN AND ENGINEERING DIVISION

CURB RAMPS AT VARIOUS LOCATIONS
FY 2001 (2)

HONOLULU, OAHU, HAWAII

SITE 78 - DEMOLITION & RAMP PLAN 1

DESIGNED BY: APPROPRIATE

DRAWN BY: APPROPRIATE

CHECKED BY: APPROPRIATE

DATE: APPROPRIATE

PROJECT NO.: APPROPRIATE

SHEET NO.: APPROPRIATE

THIS PLAN IS TO BE USED IN CONNECTION WITH THE PROJECT OF DEMOLITION & RAMP PLAN 1



